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Process and Rules in International Environmental Law

Ilias Plakokefalos*

Review Essay: Daniel Bodansky, *The Art and Craft of International Environmental Law*

I. An Overview

The book under review is not a classic textbook. It does not, in other words, try to offer a comprehensive, thematic overview of the issues that arise in the context of international environmental law.¹ It is rather an effort to present the way environmental law evolves — or ought to evolve. This is evident from the fact that in the introduction, the author makes it clear that he will follow an approach that will focus on process and not so much on substance.² Therefore, this is a book about process and how this process leads to international agreements and to the establishment of institutions that form the corpus of international environmental law. Professor Bodansky has not only offered a book that explores the process of environmental law making but has also offered a solid argument in favour of, what he calls, the ‘cool analysis’ of environmental law.³ The author has engaged in an analysis of the law making process of environmental law not only because of the absence of such a work in the literature, but also because he seems to view international environmental law, more than anything else, as a complex evolutionary process.

The book is divided into 12 chapters. The first two chapters are devoted to a presentation of the basic content and the history of international law. The following two chapters examine the main environmental problems and the policies that can resolve them. The next chapter, probably one of the most important ones, deals with the issue of environmental norms. Here,

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1. See, e.g., PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* (3d ed. 2009); ALEXANDRE KISS & DINAH SHELTON, *GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW* (2007).

2. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* (2010).

3. In his Preface, Prof. Bodansky states that his experience has led him to see problems as involving complex trade-offs and that the aim of the book is to be pragmatic. *Id.* at xi.

the author introduces the normative structure of international environmental law and analyses the proper value of the various types of norms. Chapter 6 offers a comprehensive presentation of the various actors of the international legal process while the next two chapters focus on the problems of international cooperation and on the negotiation process. In the next chapter, which draws heavily from a previously published article of the author, we are presented with an evaluation of customary environmental law. Chapter 10 gives an insight on the political, economic and practical explanations on why states implement their international environmental commitments. Chapter 11 deals with the related issue of compliance while the last chapter attempts an overall evaluation of the effectiveness of international environmental law.

Bodansky's main argument makes its consistent appearance throughout the book — International environmental law should be seen as an ongoing process that leads to negotiated proposals towards the solution of specific problems. If the predominant view of law is that of a system of binding rules, the view Professor Bodansky proposes is that “[a]n alternative approach to international environmental law is less ambitious but more realistic. It views international environmental law as a process to encourage and enable, rather than require, international cooperation.”⁴ It is important to bear in mind at all times that the participants in this process are numerous complex entities whose functions cannot be reduced to stereotypes. To give but one example, Bodansky correctly reminds us, in many occasions, that states are not unitary entities. They are abstractions whose actions in the international arena depend on a number of factors, often irrelevant to international environmental law. These complex entities (States, international organisations, NGOs, businesses) take into account and try to act according to the policies that suit their goals. These policies can lead, in turn, to a number of different solutions for each problem.

The author correctly maintains that there is no magic solution to all the problems of international environmental law. A binding instrument that contains strong commitments might be suitable for one problem while a soft law declaration that seeks to involve as many states as possible may be more suitable to a different set of circumstances. In other words, the width and depth of a convention should vary according to the target that the convention seeks to achieve. Therefore, there is not an a priori correct way. To be sure, Professor Bodansky duly notes that the power in the political arena of the respective actors is also a very important consideration, both in the adoption and in the implementation phase.

When the discussion comes to the issue of implementation, Professor Bodansky is quick to realize and therefore demonstrate, that things are rather trickier. First of all, consistent with the view of international law as process, he holds that “[i]mplementation is the process by which policies get translated into action.”⁵ The implementation process brings out the same riddles and problems as the ‘art and craft’ of law making. Again, the author focuses on the actors that are called to implement a given environmental rule or policy. He points out that there are problems arising out of the complex nature of these actors. In this connection he states for example, that the non-unitary nature of governments contributes to the problem of

4. *Id.* at 16.

5. *Id.* at 205.

rule implementation much for the same reasons it contributes to the problem of rule adoption.⁶

The author analyses the issue of compliance based on the questionable premise that environmental agreements are built on reciprocity.⁷ He first distinguishes between enforcement and managerial models of compliance. While noting that the managerial model of compliance is prevalent in international environmental law, Professor Bodansky then moves on to analyse the various methods of compliance such as national reporting and monitoring and inspection. He also provides an assessment of compliance through methods such as capacity building.

Professor Bodansky, after having analysed the reasons that render some environmental regimes more effective than others, concludes that international environmental law moves towards greater compliance.⁸ He maintains that international environmental law is 'the art of possible'⁹ and that overall, despite the shortcomings and failures of the regime, there have also been considerable successes.¹⁰ In a short passage of his conclusion, Professor Bodansky outlines his view on the future: "in order to address international environmental problems, we [...] need to develop dynamic regulatory regimes that can respond flexibly to new knowledge and problems, and that take a pragmatic and forward looking approach to issues of compliance and effectiveness."¹¹

II. Process

Looking at law as a process is certainly not a novel idea.¹² This idea can be summed up as follows: law must be seen as the decision making process that aims at the adoption of the

6. *Id.* at 210.

7. While there are certainly a large number of treaties that are premised on reciprocity, the bulk of international environmental agreements generate, in Sir Gerald Fitzmaurice's terminology, either absolute or interdependent obligations. See Mr. G. G. Fitzmaurice, Special Rapporteur, "UN Doc. A/CN.4/107, Second Report on the Law of Treaties, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1957 Vol. II, 54 (1957). There are some environmental obligations that can be termed absolute, in the sense that their violation by one party does not affect their performance by another. The majority of environmental obligations however, would probably qualify as interdependent. This essentially means that they are based on what has been called 'global reciprocity'. See Lino Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1132-1138, at 1135 (2002).

8. *Id.* at 260.

9. *Id.* at 271.

10. *Id.* at 267.

11. *Id.* at 270.

12. Generally speaking, the idea of international law as process can be identified with the Yale school of international law led by Myres McDougal and his associates. See MYRES S. MCDOUGAL AND ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (Yale University Press 1960); see also Myres McDougal, Harold Lasswell and Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968). One of the most powerful arguments in favour of the process approach has been advanced by Rosalyn Higgins. See e.g., Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L. Q. 58 (1968); Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes* (General Course on Public International Law) 230 RECUEIL DES COURS 19, 19-42 (1991) [hereinafter *Avoidance*]; ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT*

optimum solution. Rules, on the other hand, must be seen as the accumulation of past decisions.¹³ Excessive reliance on rules leads to a rather static view of the law, whereas the further one moves away from rules 'the less important becomes the distinction between *lex lata* and *lex ferenda*'.¹⁴ As Myres McDougal has observed: '[t]oo often it is assumed that the technical rules which are said to constitute international law can in one formulation describe what decision makers have done, predict what they will do, and prescribe what they ought to do' while this is simply not true.¹⁵

The fact that the book focuses on process renders it necessary for the author to engage more often in an analysis of policy choices rather than rules. This is so because a procedural view of international law means that the focus should lie with the policies that lead to the choices as to what should be included or left out on the normative level. Professor Bodansky does not seem to fully subscribe to the view of law as a process, but more often than not comes close to it. For instance he states that 'legal and non-legal approaches to controlling behavior from a continuum'.¹⁶ The interplay between *lex ferenda* and *lex lata*, soft and hard law, the considerations behind the adoption of legally binding instruments as opposed to more flexible mechanisms, and the constant and pressing question of the appropriateness of each solution on grounds of political realism, legal value and practical effectiveness, make their appearance throughout the book.

More importantly however, the author also provides his assessment of these considerations and choices. The end result can be best described as a refined exercise in eclecticism. For example, in his perceptive chapter on norms, Bodansky manages to paint a clear picture of the various levels of effectiveness of different types of norms in international environmental law. The conclusion is that "what makes a norm 'hard' is not that violations can be sanctioned" but what actually matters is the state of mind of the actors.¹⁷ Nevertheless, Professor Bodansky maintains that the legal nature of a norm is important because, all other things being equal, states are more likely to comply with a legal rather than with a non-legal norm.¹⁸ At the same time he concludes that international environmental law does not rely on the traditional model of 'obligation-breach-state responsibility-remedy'. International environmental law has developed a unique system focused on rendering the regime more effective¹⁹ and its role is to find "the skillful compromise that bridges the gap between competing positions[.]"²⁰

(1995). Anthony D'Amato has adopted a similar approach in his book on custom. See ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971). D'Amato's views on custom were subsequently heavily criticized by writers such as Thirlway and Akehurst. See HUGH THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION*, 49-54 (A.W. Sijthoff: Leiden 1972) and Michael Akehurst, *Custom as a Source of International Law* 47 BRIT. Y.B. INT'L L. 1 (1974-5).

13. See *Avoidance*, *supra* note 12, at 25.

14. *Id.* at 34.

15. See Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 144 (1953).

16. BODANSKY, *supra* note 2, at 250.

17. *Id.* at 101.

18. *Id.* at 102.

19. *Id.* at 269.

20. *Id.* at 271.

A few remarks on the approach of the author would be useful at this point. First of all, it is readily conceded that international environmental law is one of the branches of international law where the procedural element is prominent. Most environmental treaties provide for a framework for co-operation, which facilitates negotiations and allows for the elaboration of issues pertinent for the convention at hand. This model is sometimes accompanied by obligations that themselves are procedural in nature, such as reporting, exchange of information or the duty to consult and negotiate. The question that emerges is whether this type of commitment to co-operation is the way forward, or whether international environmental law has reached a certain level of maturity that allows for the adoption of more concrete, legally binding obligations.

It is very hard to deny that the conclusions of Professor Bodansky are utterly realistic and very close to perfectly describing the state of environmental law. The problem with this approach is that it sometimes can lead to a situation wherein states negotiate and end up with commitments to re-negotiate while subscribing to a number of intermediate procedural rules. To a significant extent this is the process followed in the negotiation of the new commitment period for the Kyoto Protocol. This is not the place to get into a discussion on the merits of Durban, but it seems that while a positive step towards a legally binding document has been taken, the outcome will remain a mystery for some years.²¹ As Martti Koskenniemi has noted, “[t]he substance of general international environmental law calls for equitable compromises between the environmental and economic interests involved in the particular situation. Because of the openness and contextuality of this substance, the law turns to procedure.”²² It is submitted that without clearly defined rules (that need not be necessarily static) or binding procedures that lead to, as often as possible, predictable results, in a number of instances international environmental law will remain just a process wherein decision making will be taking place without ever reaching a substantive result. In this connection, customary law, third party dispute settlement and state responsibility might play a key role. In some instances the breadth of custom can be proved useful, the rules of state responsibility may result in both preventive and remedial action and the final decision of a tribunal might provide for a solution to a specific and pressing problem.

III. Custom, Third Party Dispute Settlement and State Responsibility

The issue of customary law, the issue of state responsibility and the role of third party dispute settlement are central to Bodansky’s major argument. Custom receives separate treatment in Chapter 9 while a less extensive account of third party dispute settlement and state responsibility is made in chapters 9 and 11.

21. See Daniel Bodansky, *Evaluating Durban*, OPINIO JURIS (Dec. 12 2011, 6:00 PM), <http://opiniojuris.org>. The author concludes that “the Durban Platform does not specify anything about the content of the new ‘protocol, another legal instrument or legal outcome with legal force.”

22. Martti Koskenniemi, *Peaceful Settlement of Environmental Disputes*, 60 NORDIC J. INT’L L. 73, 84 (1991).

Customary law has been the subject of a paper by Professor Bodansky²³ and the relevant chapter in the book draws heavily from that work. In the paper, the author had put forward the view that international lawyers should focus more on the development of detailed treaty rules than debating the status of the various customary environmental norms.²⁴ Professor Bodansky bases his view on the premise that, regardless of the process of formation of custom, the norms of customary international law do not represent regularities in state behavior.²⁵ The survey of customary law by international lawyers is essentially a survey of what is termed 'declaratory law': in other words, custom accounts for what states say rather than what they do.²⁶ The role declarative law has to play in exerting a 'compliance pull' on the level of interstate behavior, as opposed to third party dispute settlement, is minor.²⁷

The book offers a slightly more nuanced version of the main argument presented in the paper. Professor Bodansky begins his assessment by examining how the constitutive elements of customary law, namely state practice and *opinio juris*, have been studied in the literature.²⁸ He concludes that a "pluralist view" of customary law is probably the more correct outlook, as, under that view, "customary norms operate differently in different communities of actors, in some cases as a formal source and in others as a social norm."²⁹ The author moves on to explain that this is the only way to account for the variety in which the term customary law is being used.³⁰ At this point a differentiation between the book chapter and the paper makes its appearance. In the book, Professor Bodansky asks a two-pronged question as to the value of customary law. First, he asks, "to what degree have social (customary) norms developed relating to international environmental protection" and whether one is able to induce these norms by observing what international actors do.³¹ Professor Bodansky argues that since there is no available systematic survey of state practice the answer must lean towards agnosticism. On the other hand, the answer to the second question, on whether the principles of international environmental law reflect regularities of behavior, is in the negative.³² The example used by the author is that of the prevention of transboundary pollution. These observations lead to the conclusion that customary principles 'operate primarily to channel future decision making rather than to govern behavior directly'.³³

There is no denying that Professor Bodansky makes a very strong point in favor of an idea of customary international law as a reference tool for future decision-making. Before embarking upon an appraisal of Professor Bodansky's view on custom, a preliminary

23. Daniel Bodansky, *Customary (and not so Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 105-19 (1995-1996). The title of the relevant Chapter of the book bears the same title.

24. *Id.* at 119.

25. *Id.* at 110.

26. *Id.* at 112-13.

27. *Id.* at 118.

28. BODANSKY, *supra* note 2, at 194-96.

29. *Id.* at 196.

30. *Id.*

31. *Id.* at 197.

32. *Id.* at 198.

33. *Id.* at 201.

observation is in order. It is obvious that in order to provide for an assessment of the argument put forth by Professor Bodansky on the topic of custom there is the need to have recourse to sources and materials that the author does not recognize as evidences of state behavior.³⁴ Nevertheless this methodology exemplifies in practice the different approach followed in this review.

First of all, there is the issue of excessive reliance on what states say rather than on what they do.³⁵ This accounts for a rather restrictive definition of state practice, in the sense that claims or declarations made by states are treated as minor incidents within the realm of their practice. In this connection, one must observe that it is in fact rather difficult to choose what to pay attention to: acts or words? Both the USA and the USSR were involved in two different occasions of transboundary environmental harm, while they maintained that they did not consider themselves responsible.³⁶ They nevertheless did pay for compensation. What an international lawyer is to discern from that behavior? In much the same vein, state behavior concerning treaties is also difficult to evaluate. While states may not become parties to a treaty, they may nevertheless behave in a manner that is not far removed from the one prescribed by the treaty in question.³⁷ Moreover, there are occasions where declaratory law is indeed important even in a dispute settlement situation. The International Court of Justice has relied on declarations of states in order to reach a decision the most notable case being the Nuclear Tests (New Zealand v. France, Australia v. France)³⁸ and the most recent being the case concerning the Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece).³⁹ Therefore it emerges that the way states 'speak to each other'⁴⁰ sometimes does make a significant difference.

Professor Bodansky refers, both in the book and in the paper, to the rule that prohibits transboundary harm, as an example to back his argument that international lawyers may accord customary status to a particular norm while in reality the norm is more honored in the

34. *Id.* at 200.

35. *Id.*

36. For a discussion of the Marshall Islands incident involving the U.S and Japan, see *Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities)*, prepared by the Secretariat of the ILC, at 136-137, U.N. Doc. A/CN.4/543, (2004). For a discussion of the Cosmos incident involving the USSR and Canada, see *Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, 18 ILM (1979) 899-931.

37. See e.g., the US Oil Pollution Act, 33 U.S.C. §§ 2701-61 (2006). Also note the relationship between the Act and the International Convention on Civil Liability for Oil Pollution Damage, 973 U.N.T.S. 3 (1969).

38. Nuclear Tests Case (New Zealand v. France) Case, 1974 I.C.J. 457; Nuclear Tests Case (Australia v. France) Case, 1974 I.C.J. 253; Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, available at <http://www.icj-cij.org/docket/files/142/16827.pdf>.

39. In the case between FYROM and Greece the ICJ relied heavily on diplomatic correspondence and on various statements made before the Greek Parliament and in other *fora* by Ministers, as well as the Prime Minister, of the Greek Government to the effect that the objections on behalf of Greece for the admission of FYROM in NATO did indeed constitute a veto. See *Application of the Interim Accord*, *supra* note 38, ¶¶ 73-82.

40. BODANSKY, *supra* note 2, at 201.

breach than in the observance.⁴¹ At a closer look, this rule does not mean that all transboundary pollution is prohibited, or even that significant pollution is prohibited. The fact that states pollute on a daily basis does not automatically mean that the rule is breached on a daily basis too. First, the obligation to prevent transboundary harm is an obligation of conduct and not of result.⁴² This essentially means that states are under an obligation to exercise due diligence in conducting activities that might have significant transboundary environmental impact.⁴³ Due diligence can in turn be analyzed in a number of more specific obligations, such as the obligation to conduct impact assessments,⁴⁴ exchange information or enter into consultations. If states perform these obligations then, even if harm occurs, there is no state responsibility. This analysis showcases that while international environmental law has made a cornerstone of its edifice the obligation to prevent transboundary harm, its nature is much more nuanced and much more lenient from what appears in the first place. The point made here is not that these obligations are followed by all states at all times, but that the breach of this obligation, is not that common a phenomenon so as to render it devoid of any real meaning.

It is true that international lawyers debate customary law because they subconsciously refer to a third party settlement situation.⁴⁵ Since third party dispute settlement is not a daily occurrence in international law; excessive debate, or reliance, on custom is not proportionate to the reality on the ground. Nevertheless, it seems that there has been a growth of these situations in international environmental law during the last few years.⁴⁶ The International Court of Justice has been confronted with one case that bears directly on environmental law and has two more on its docket.⁴⁷ The International Tribunal for the Law of the Sea has also

41. Even though the phrase in Hamlet has a literal meaning (i.e. that the breach would actually confer more honor than the observance) it must be observed that, uncannily enough, Shakespeare indeed employed the verse in order to comment on a customary social norm.
42. See Jean Combacau, *Obligations de résultat et obligations de comportement : quelques questions et pas de réponse*, in MÉLANGES OFFERTS À PAUL REUTER, LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ, 181 (1981), 181; Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999).
43. Case Concerning Pulp Mills on the River Uruguay, (Argentina v. Uruguay), 2010 I.C.J. 135 (April 20) ¶ 101 available at <http://www.icj-cij.org/docket/files/135/15877.pdf>. See e.g., Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50, 59; PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 882 (2d ed. 2003); BIRNIE, BOYLE & REDGWELL, *supra* note 1, at 147.
44. The ICJ affirmed that the obligation to conduct an EIA is now part of general international law. See *Pulp Mills*, *supra* note 42, ¶ 204.
45. BODANSKY, *supra* note 22, at 117.
46. See e.g., Duncan French, *Environmental Dispute Settlement: The First (Hesitant) Signs of Spring?* 19 HAGUE Y.B. OF INT'L L. 3 (2006). See also TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION (Cambridge University Press, 2009).
47. *Pulp Mills*, *supra* note 42. The cases pending are: Aerial Herbicide Spraying (Ecuador v. Colom.) 2011 I.C.J. 31 (Oct. 21), available at <http://www.icj-cij.org/docket/files/138/16727.pdf#view=FitH&pagemode=none&search=%22ecuador%20v.%20colombia%22> (last visited March 27, 2012); Whaling in the Antarctic (Austl. V. Japan) 2010 I.C.J. 23 (July 20) available at <http://www.icj-cij.org/docket/files/148/15979.pdf#view=FitH&pagemode=none&search=%22whaling%20in%20the%20antarctic%22>.

dealt with at least three cases that have significant environmental content.⁴⁸ One must also consider arbitral awards⁴⁹ and decisions of specialized tribunals,⁵⁰ as well as hybrid third party dispute settlement procedures such as the one endorsed by the Espoo Convention.⁵¹ At the same time there is increasing reliance on international environmental law by regional courts.⁵² The development of a larger body of case law will arguably bring about a further elaboration on the relevant customary and treaty rules of international environmental law. While it is evident that this elaboration will be slow, fragmented or uneven, one cannot deny that it will have the effect of clarifying certain concepts that cause considerable frustration for the time being.

Closely connected to the issue of third party dispute settlement is the issue of state responsibility. Bodansky deals with the issue of responsibility in Chapter 11. He concludes that state responsibility is ill suited for international environmental law for three main reasons: it is legalistic, it views the world in static terms and it is formalistic.⁵³ It is submitted that all three reasons are not an accurate assessment of state responsibility. First of all, one must bear in mind that state responsibility is to be used primarily in a context of dispute settlement. Dispute settlement is by its nature a legal procedure that requires legal standards so as to function smoothly. True, factual or logical considerations sometimes take the upper hand, but this does not mean that there is no need for clear secondary rules that will be used as tools by the courts and tribunals in their decision making process. Second, it is not true that state responsibility can only be utilized in order to restore the status quo ante. In some instances, state responsibility can be employed in a preventive context. In both Pulp Mills and MOX litigation battles, Argentina and Ireland requested the prescription of

48. See, e.g., The MOX Plant Case (Ir. v. Kingdom), 2001 ITLOS Case No. 10, ¶ 89 (Dec. 3, 2001), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/2001-5.13.11.01.E.pdf; see also Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), XXVII UNRIAA 133 (Sept. 1, 2005) available at http://untreaty.un.org/cod/riaa/cases/vol_XXVII/133-145.pdf; Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 2001 ITLOS Case No. 17, (Feb. 1, 2011), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

49. See, e.g., Arbitration Regarding the Iron Rhine Railway (Belg. v. Neth.), XVII UNRIAA 31 (May 25, 2005) available at http://untreaty.un.org/cod/riaa/cases/vol_XXVII/35-125.pdf.

50. See, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Related Products, WT/DS58/AB/R. (Oct. 12, 1998); Report of the Panel, United States – Restrictions on Imports of Tuna, GATT Doc. DS/29/R 33, (June 16, 1994). See Jorge Viñuales, *Foreign Investment and the Environment in International Law: An Ambiguous Relationship*, 80 BRIT. Y.B. OF INT'L L. 244 (2009) for an excellent overview of the environmental issues that arise before ICSID tribunals.

51. Even though the Inquiry Commission, set up pursuant to article VI of the Espoo Convention (See Espoo Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309) is not a legal body but a technical one, it is a good example of how concrete legal obligations that have a significant technical element can be resolved within the confines of a treaty body.

52. See *AJD Tuna Ltd v. Direttur tal-Agrikoltura u s-Sajd, Avukat Generali*, 2011 O.J. (C 221) 9 available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80446&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=231271>.

53. BODANSKY, *supra* note 2, at 247.

provisional measures⁵⁴ by the ICJ and the ITLOS. The Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts do not favor either a remedial or a preventive action. They can be used so as to address both situations and indeed they have been. Third, state responsibility is indeed, as Professor Bodansky suggests, formalistic. This is a problem if one accords to state responsibility more value than it deserves and at the same time denies any significant role to dispute settlement. However it is submitted that state responsibility is a tool that can be used so as to address specific issues of breach of an international obligation. State responsibility cannot break an impasse in negotiations nor can it promote the optimum solution to an environmental problem. It can nevertheless prove to be a very useful tool in environmental litigation and through its employment by international courts it can provide for solutions to the particular problems at hand.

The observations made so far in this section do not mean that the identification and use custom is without problems or that third party dispute settlement or state responsibility are panacea. On the contrary, the elaboration of customary law, its acceptance by states and, in the end, the implementation of the obligations is neither smooth nor homogenous.⁵⁵ However, it is undeniable that the progress made during the past few years permits some optimism. The lack of a binding obligation towards third party dispute settlement permeates every single issue of international law. In the context of international environmental law, states have been slow to have recourse to courts. It is only during the last decade that states have utilized the option of judicial proceedings. Regardless of the parallel development of implementation procedures in an ever-growing number of environmental treaties, dispute settlement procedures have never been expressly ruled out. Besides their role as decision makers over a specific dispute, international courts and tribunals also help clarify and elaborate legal rules. Finally, the rules on state responsibility are not perfect. There are a number of problems, usually not with what was included in the articles of the ILC but mainly with what has been left out or has not received adequate elaboration.⁵⁶ The fact of the matter however, is that the articles have been applied by international courts and actually seem to work. Their shortcomings are not that problematic as far as international environmental law is concerned. What is more problematic, from an environmental perspective, is the lack of a solution to the problem of liability, an issue that was also recognized by the ITLOS Seabed Chamber in its recent advisory opinion.⁵⁷

54. *Pulp Mills*, *supra* note 42, ¶ 101; *MOX*, *supra* note 48, ¶ 89.

55. Akehurst, *supra* note 11, at 16-18.

56. See ANDRE NOLLKAEMPER & DOV JACOBS, SHARED RESPONSIBILITY IN INTERNATIONAL LAW: A CONCEPT PAPER, ACIL Research Paper No 2011-07 (SHARES Series) (Aug. 2, 2011), *available at* <http://www.sharesproject.nl/wp-content/uploads/2011/08/Nollkaemper-Jacobs-Shared-Responsibility-in-International-Law-A-Concept-Paper.pdf>.

57. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, 2001 ITLOS Case No. 17, ¶209 (Feb. 1, 2011), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

IV. Conclusion

The Art and Craft of International Environmental Law is a book that must be read by everyone, even remotely, interested in international environmental law. It is a book that presents with clarity, precision and eloquence all the issues that pertain to the making of international environmental law, despite its disregard for the more traditional approaches to some problems of international environmental law. The main strength of this effort is that the argument of the author is consistently supported throughout the book with eloquence and lucidity. This is indeed a major achievement in a field of international law that is highly complicated.